

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1288

B
P/S

Appellee,

LUIS BUSTAMANTE.

*On Appeal from a Judgment of Conviction of the United States
District Court for the Southern District of New York.*

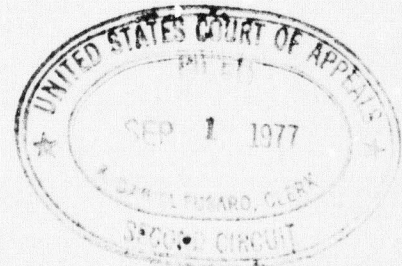
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JUDGE GAGLIARDI

73 CRIM. 953

TITLE OF CASE

RELEVANT DOCKET ENTRIES

ATTORNEYS

1a

THE UNITED STATES

(pp. 1a-3a)

For U. S.:

Daniel J. Pykett, AUSA

vs.

-1197

LUIS BUSTAMANTE

File 11-26-73

JACINTO MOREIRA

1-24-74

1230

DONA MUNOZ

1-23-74

For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(07)					
re, 2.2		1-24-74	Luis Bustamante	500	
rk,		1-24-74	Moreira		500
trial, 21-01			(Koppeitnik)		
OTNEY,					
XXXXXXXXXXXX T. 21					
846,812,841(a)(1)					
(1)(A). Distr. & possess.					
intent to distr. Schedule II (Ct2)					
cocaine) Consp. so to do (Ct1)					
(Two Counts)					

PROCEEDINGS

1-73 Filed indictment.

1-73 Defts. Moreira and Munoz..Plead not guilty. Bail continued as to both defts. Case assigned to Judge Gagliardi for all pruposes.

MacMahon, J.

73 Bustamonte pleads not guilty (atty present) bail cont'd. MacMahon, J.

73 Deft Jacinto Moreira-motion for bail reduction- denied. Brvan, J.

73 Filed (Luis Bustamante) notice of appearance by atty: Harry R. Pollad: 299 Bway, NYC 10007 Be 3-0386.

	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
5-25-73	Filed deft's notice of motion re: suppression of evidence, etc.		
12-73	D. MUMOZ- filed notice of appearance by atty: Edward S. Panzer, 299 Bway, NYC 10007 349-6128 by CJA assignment.		
12-73	J. MOIREIRA- filed notice of appearance by atty Almeida Pulmeitter 258 Bway, NYC 10007 Wo-4-3465.		
1-19-73	D. Mumoz (atty present) deft pleads guilty to ct 1 only. Pre-sentence investigation ordered for sentence 1-15-74 at 9:30. No bail.		
2-26-73	JACINTO MOREIRA (atty & interpreter present) Deft withdraws plea of not guilty and now pleads GUILTY to count 1 only. Pre-sentence investigation ordered. for sentence 1-22-74. Deft remanded in lieu of bail fixed at \$25,000. LUIS BUSTAMONTE-bench warrant ordered, bail forfeited. Gagliardi, J.		
3-73	Filed ORDER that Mrs. Libya Clancy of 44 Lispenard Street, NYC be engaged as interpreter for atwo hour period, fee not to exceed \$30.00 pursuant to authority conferred by Rule 28(b) of FRCP. Gagliardi, J. mn		
20-73	Filed ORDER that the Clerk of this Court pay out of the registry of this Court to the Treasurer of the United States the sum of Five Hundred dollars (\$500.) in payment of said forfeiture. Gagliardi, J. mn		
1-74	DONA MUMOZ-(atty present) Filed JUDGMENT.-Deft is hereby committed to the custody of the Atty General or his authorized representative for imprisonment for a period of TWO (2) YEARS. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, deft is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement. Count 2 is dismissed on motion of deft's counsel with consent of the Govt. Gagliardi, J. mn 1-24-74 Issued commitments.		
1-74	JACINTO MOREIRA-(atty present) Filed JUDGMENT.- Deft is hereby committed to custody of the Atty General or his authorized representative for imprisonment for a period of THREE (3) YEARS. Pursuant to the provisions of Section 841 of Title 21, U.S. Code, deft is placed on Special Parole for a period of THREE (3) YEARS, to commence upon expiration of confinement. Count 2 is dismissed on motion of deft's counsel with consent of the Govt. Gagliardi, J. mn 1-24-74 Issued commitments.		
1-74	J. Moreira- filed CJA form 21 authorization for payment of fees of expert services of M. Cardenas, interpreter. Gagliardi, J. mailed copies.		
2/24/74	J. Moreira- Filed JUDGMENT. 11/2-73		
2/24/74	J. Moreira- Filed JUDGMENT. 11/2-73		

PROCEEDINGS

D. MUNOZ -

... returned to FDH 1/22/74

1/8/74 D. MUNOZ - filed notice of motion re: reduction of sentence, etc.

12/1/74 Luis Bustamante

Closed case because

(1) Defendant is

(2) Defendant is

(3) Defendant is

In all cases, this case

is still pending

Gagliardi J.

1/6/74 All papers filed with Magistrate Judge:

(1) docket entry sheets (4)

(2) criminal complaint

(3) disposition sheet

(4) appointments of counsel (4)

(5) notice of appearance (3)

(6) temporary commitment

(7) set aside bonds (3)

(8) dismissal slip (1) (A. G. ...)

2-2-77 LUIS BUSTAMANTE - filed documents forwarded by Magistrate Gershon:
 3-19-77 Deft. presented under R.9(c)(1) for the purposes of bail
 Deft. remanded into the custody of the U.S. Marshal in lieu of
 \$25,000. cash/surety.

03-30-77 Filed Magistrate's final commitment for deft. Luis Bustamante dated 3-19-77.

04-11-77 Luis Bustamante - (att. Stuart Shaw) hearing held - trial date
 5-9-77 at 9:30AM. Gagliardi J.

04-29-77 Luis Bustamante - ET.C held Govt's motion to go to trial
 on this Ind. & the bail jumping Ind at the same time is granted.
 Gagliardi J.

5-10-77 Filed (deft Gora Munoz) one envelop sealed by order of Judge Gagliardi.

5-11-77 Filed (deft Dora Munoz) sentencing transcript - sealed by order of Judge Gagliardi.

4-29-77 Indictment on govt motion consolidated for trial with
 77cr 319 Gagliardi J.

5-9-77 Jury Trial begun before Gagliardi J.

5-10-77 Trial contd.

5-11-77 Trial contd

5-12-77 Trial contd - concluded Jury verdict ct 1 guilty. ct
 ct 2 not guilty guilty on 77 cr 319 PSI ordered sent 6-9-77 deft
 remanded (no bail) Gagliardi J.

5-18-77 Filed transcript of record of proceeding held on 4-29-77

5-18-77 Filed transcript of record of proceeding held on 10-16-73

5-18-77 Filed transcript of record of proceeding held on 4/11/77

5-22-77 Filed Notice of Appeal by dft Luis Bustamante to the U.S.C.A.
 from the jdgt entered 6/16/77. Notice to US Atty & dft.

DJF:js

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----X
UNITED STATES OF AMERICA, :

-v- :

LUIS EUSTACHE,
JACINTO MOREIRA, a/k/a "Rocky", and
DORA MOREIRA, :INDICTMENT

73 Cr. 953

Defendant. . :

-----X
The Grand Jury charges:

1. From on or about the 1st day of September, 1973
and continuously thereafter up to and including the date of
the filing of this indictment, in the Southern District of
New York,

**LUIS EUSTACHE,
JACINTO MOREIRA a/k/a "Rocky", and
DORA MOREIRA**

the defendant and others to the Grand Jury unknown, unlaw-
fully, intentionally and knowingly combined, conspired, confederated
and agreed together and with each other to violate Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said
defendant unlawfully, intentionally and knowingly would distribute
and possess with intent to distribute Schedule I and II
narcotic drug controlled substances the exact amount thereof
being to the Grand Jury unknown in violation of Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

5/1/71

intent to distribute narcotic drug.)

BJP:js

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about October 2, 1973, defendant **LUIS BUSTAMANTE** had a telephone conversation.

2. On or about October 2, 1973, defendant, **DORA MEROZ** possessed approximately one-half kilogram of cocaine.

(Title 21, United States Code, Section 846).

SECOND COUNT

The Grand Jury further charges:

On or about the 2nd day of October, 1973, in the Southern District of New York, **LUIS BUSTAMANTE**, **JACINTO MOREIRA**, a/k/a "Rocky", and **DORA MEROZ**, the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 489.3 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2)

FURMAN

PAUL J. COTRAN
United States Attorney

INDICTMENT 77 CR 319
(Filed April 29, 1977)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

-v- :

LUIS BUSTAMANTE, :

Defendant. :

INDICTMENT

77 Cr. 319

-----X

The Grand Jury charges:

On or about the 26th day of November, 1973, in the Southern District of New York, LUIS BUSTAMANTE, the defendant, having been released on bail in connection with a charge of felony did unlawfully, wilfully and knowingly fail to appear before a court and judicial officer as required.

(Title 18, United States Court, Section 3150.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

JUDGE'S CHARGE
(pp. 7a-53a)

434

hpe 298

CHARGE OF THE COURT

THE COURT: You are about to enter upon your final duty, which is to decide the fact issues in the case.

As I told you in my instructions at the beginning of the trial your principal function during the taking of testimony would be to listen carefully and observe each witness as he testified, and it has been evident, that you have faithfully discharged this duty.

We have now reached the point of the case where all the evidence has been presented and the closing arguments of the lawyers have been made. Shortly, after I have completed my explanation of the applicable law, you will retire to deliberate upon your verdict.

You are to perform your final duty in an attitude of complete fairness and impartiality. You are to appraise the evidence calmly and deliberately and, as was emphasized by me at the time of your selection as jurors, without bias or prejudice, sympathy or favor with respect to either the Government or to the defendants as parties to this controversy.

The fact that this prosecution is brought in the name of the United States of America entitles the Government to no greater consideration than that accorded to the defendant and or any other party in the case. By the same token, it is

1 here 299

2 entitled to no less consideration. All parties stand as equals.
3 before the bar of justice.

4 Your final role is to pass upon and decide the
5 fact issues in the case. You, the members of the jury, are
6 the sole and exclusive judges of the facts. You pass upon the
7 weight of the evidence; you determine the credibility of the
8 witnesses, you resolve such conflicts as there may be in the
9 testimony, and you draw whatever reasonable inferences that
10 are to be drawn from the facts as you have determined them to
11 be.

12 My function at this point is to instruct you on the
13 law. It is your duty to accept these instructions of law and
14 apply them to the facts as you determine the facts to be. The
15 logical result of that application is the verdict in the case.

16 Now, with respect to any fact matter it is your
17 recollection and yours alone that governs. Anything that
18 counsel, either for the Government or for the defense, may have
19 said with respect to any matters in evidence, that is, as to
20 any factual matter, whether stated in a question, in argument
21 or in summation, is not substituted for your own independent
22 recollection.

23 So too, anything the Court may have said during
24 the progress of the trial with respect to a fact matter or may
25 say during the course of these instructions, is not to be

1 hpe 300

2 taken in substitution for your own independent recollection
3 which governs at all times.

4 Before we consider the precise charges of the
5 indictment, a number of preliminary observations may be help-
6 ful to you.

7 In determining the facts, you should not be
8 influenced by rulings that the Court may have made during the
9 trial. These rulings dealt with matters of law and not
10 questions of fact. Counsel for both sides have not only the
11 right but, indeed, the duty to press whatever legal objections
12 they believe exist as to the admission of relevant evidence.
13 The Court's rulings on objections made either by the attorneys
14 for the Government or the attorneys for the defendant, are not
15 to be considered by you. Of course, as I told you at the out-
16 set, where I have sustained an objection to a question you must
17 not speculate on what the witness would have said had he been
18 permitted to answer. Nor may you draw any inference from the
19 wording or the question or that it was asked. Similarly,
20 where any testimony has been stricken, it is not evidence and
21 you are bound to disregard it. However, I am sure you realize
22 that in ruling on objections I was deciding questions of law
23 and not questions of fact, which are for you alone.

24 I recognize that there is a possibility that a
25 judge can have a great deal of influence with the jury. If you

1 hpe 301

2 think that you have gleaned some indication as to my opinion
3 of the case either from any questions I may have asked or from
4 my expression or tone of voice, disregard it entirely. The
5 Court has no opinion as to the veracity or the credibility of
6 the witnesses or the guilt or innocence of this defendant.
7 You are the judges of the facts and you are the sole judges
8 of the guilt or innocence of this defendant. I am merely a
9 judge of the law. The fact issues must be decided by you
10 solely and only within the framework of the evidence and
11 the principles of law that apply.

12 Finally, please don't single out any one instruc-
13 tion of mine as stating the law alone. Take them all into
14 account after you have heard them all.

15 You are to consider only the evidence in this
16 case which consists of the sworn testimony of the witnesses,
17 the exhibits which have been received in evidence, the facts
18 which have been stipulated and the presumptions which I will
19 tell you about, such as the presumption of innocence. But
20 while you are to consider only the facts of the evidence in
21 this case, you are not limited to the bald statements of the
22 witnesses. On the contrary, you are permitted to draw from
23 the facts which you find have been proved such reasonable
24 inferences as seem justified to you in the light of your own
25 experience.

1 hpe 302
2 An inference is merely another word for a con-
3 clusion which reason or common sense leads you to draw from
4 the facts that have been proved here.

5 In considering the evidence, you must remember, as
6 I told you at the beginning of this trial, that the indictment
7 is only a formal method of accusing a defendant of the crime
8 charged and it itself is not evidence against the defendant;
9 nor is any weight to be given to the fact that an indictment
10 has been returned against the defendant.

11 Generally speaking, there are two types of evi-
12 dence from which a jury may properly find the truth as to the
13 facts of a case. One is direct evidence, such as the testi-
14 mony of an eyewitness, somebody who saw or heard something
15 done or said.

16 The other is indirect or circumstantial evidence
17 which is the proof of a chain of circumstances pointing to the
18 existence or non-existence of certain facts. Generally, the
19 law makes no distinction between direct and circumstantial
20 evidence, but simply requires that the jury find the facts in
21 accordance with all the evidence in the case, both direct and
22 circumstantial.

23 We have a rather simple and common example that we
24 use to most jurors in connection with describing the difference
25 between direct and circumstantial evidence. To you who have

1 hpe 303

2 not heard it before it may be helpful. I have used it, I
3 guess, in almost every case in which I have charged a jury.

4 Let's assume, as is the case when you came in here
5 this morning, this is such a beautiful sunny day, it's a
6 beautiful sky up there, you could see that and you can tell
7 that and observe it. The observation of the weather conditions
8 at the present time. Let's assume further we were in one of
9 those courtrooms off the front entrance to this building and
10 those courtrooms or one of the courtrooms down there doesn't
11 have any windows in it at all, it is one of those modern,
12 ugly courtrooms.

13 Let's assume you had been in there for an hour and
14 a half or so and after that hour and a half you saw a specta-
15 tor come in and his clothes were wet, damp, he is dripping
16 water from his head and there is a drip or two on his face.
17 Let's assume a few minutes later another spectator comes in
18 and he's got a hat in his hand, dripping water, and he has an
19 umbrella dripping water and a third spectator comes in a
20 moment or to later, he has a rain coat on and he looks like the
21 same person as the first one, a rain coat and water on his face
22 and head and on the raincoat.

23 You can assume from those facts that while it had
24 been very nice and pleasant when you had come in and there had
25 been no hint of change in the weather, those circumstances

1 hpe 304
2 would lead you to believe that in fact it was raining outside
3 at the time. That's circumstantial evidence, a chain of cir-
4 cumstances pointing to the existence or non-existence of cer-
5 tain facts.

6 As I have indicated to you before the law makes no
7 distinction between direct and circumstantial evidence but
8 merely requires that you find the facts in accordance with
9 all the evidence in the case.

10 The defendant has pled not guilty to the charges
11 in the indictment and thus the burden is on the prosecution to
12 prove guilt beyond a reasonable doubt. This burden never shifts
13 to a defendant for the law never imposes upon a defendant in a
14 criminal case the burden or duty of calling any witnesses or
15 producing any evidence.

16 As I told you during your selection as jurors and
17 in my instructions at the commencement of the trial, the law
18 presumes a defendant to be innocent of a crime. Thus, a
19 defendant although accused, begins the trial with no evidence
20 against him and the law permits nothing but legal evidence
21 presented before you as jurors to be considered in support
22 of any charge against a defendant.

23 The presumption of innocence remains with the
24 defendant throughout the trial and your deliberations until
25 such time, if ever, that you are satisfied of guilt beyond a

reasonable doubt. Thus, the presumption of innocence alone is sufficient to acquit a defendant unless and until, after careful and impartial consideration of all the evidence in the case, you as jurors are unanimously convinced of a defendant's guilt beyond a reasonable doubt.

The indictment in this case contains three counts. You will be asked in your deliberations to consider each count. Count one is the conspiracy count. Counts two and three are what we call substantive counts. Each of these counts charge a separate crime or offense and each must be considered separately. The indictment names three defendants in all. Only one defendant, that is, Luis Bustamonte, is on trial before you. He is the only person whose guilt or innocence you must announce in your verdict although as I will explain to you shortly in considering the guilt or innocence of Luis Bustamonte you may have to determine the nature or the participation, if any, of the other named defendants or co-conspirators.

In the determination of innocence or guilt, you must bear in mind that guilt is personal. The guilt or innocence of the defendant on trial before you must be determined separately with respect to him solely on the evidence presented against him or the lack of evidence. The case of this defendant stands or falls upon the proof or lack of proof of the

charge against him and not against anybody else.

Before I get to the special charges in the indictment, and read portions of it to you, I am going to read to you just the list and where appropriate a short description of the persons who appeared before you on the stand here in the order in which they appeared. This has been a relatively short trial and I'm sure the testimony is fresh in your mind and there is no need for me to go over the testimony of these witnesses.

Our first witness was Ana Garcia. She was followed on the stand by Joseph Sullivan, Special Agent of the Drug Enforcement Agency. The next witness was another agent of the Drug Enforcement Agency, Edward Magnuson. Following that there was a stipulation that was read and I believe was introduced in evidence, that if Edward Manning were called, he would testify as to certain facts, mainly as I recall it, and again it is your recollection that governs, the weight or the analysis that he made of the exhibit that is in here, it's weight and its purity and so forth.

The next witness was Libia Clancy, who was an interpreter from Spanish to English. She was followed on the stand by Thomas C. Leupp, who was a criminal investigator attached to the Immigration and Naturalization Service of the Department of Justice.

1 The next witness was Daniel Pykett, who was a former
2 Assistant United States Attorney. After that Miss Clancy was
3 recalled, following which the Government rested its case.
4

5 The defense called Frederick Begell and Luis
6 Zurita, Carmen Bustamonte the wife of the defendant, Carlos
7 Julio Bustamonte, the defendant's brother, Gonzalo Serrano,
8 Assistant United States Attorney Richard Lawler and then Mr.
9 Zurita was recalled and he was the final witness at which
10 time both sides rested. That's my recollection of the order
11 in which the testimony went in. Of course it is your recol-
12 lection that governs at all times.

13 Against this background we turn to Count 1 of the
14 indictment which is the conspiracy count. Let me suggest to
15 you that while my description of this would take rather con-
16 siderable amount of time and I'll go through it as slowly as
17 I can, it is not that complicated but it all has to be said to
18 you and read to you and you have to understand it all.

19 This is Count 1 of the indictment which charges
20 the defendant and the defendant's name in the indictment are
21 Luis Bustamonte, Jacinto Moreira, also known as Rocky, and Dora
22 Munoz.

23 As I told you, we are considering only here the
24 guilt or innocence of this defendant. It charges these defend-
25 ants with violating Title 21 United States Code Section 846,

but it reads as follows in the pertinent part:

"Any person who conspires to commit any offense against the Federal Narcotics Laws commits a crime. Title 21 of the United States Code, Sections 812, 841 (a) (1) and 841(b) (1) (a), make it unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute cocaine."

The conspiracy count itself is divided into two sections. I will read the first section to you now and the second section which we referred to as overt acts later on, but they are all only one count. It reads as follows:

"The Grand Jury charges from on or about the 1st day of September 1973 and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York," which for our purposes includes New York County, Manhattan, Bronx County and some other counties that run from along the Hudson River up just south of Albany but does not include the County of Queens, "Luis Bustamonte, Jacinto Moreira, also known as Rocky and Dora Munoz, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a) (1) and 841(b) (1) (A) of Title 21, United States Code.

"2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code."

Incidentally, you will be able to take with you to the jury room the indictment, part of which I read to you.

Before you may find a defendant guilty of conspiracy as charged in Count one of the indictment, you must find the following three elements beyond a reasonable doubt. Later on I will define the term for you beyond a reasonable doubt but the following three elements must be found beyond a reasonable doubt, and I'll summarize them again after I have read them to you and explained some parts of them.

First, that sometime approximately between September 1, 1973 and October 11, 1973, the date specified in the indictment, an agreement or understanding existed between any two or more named conspirators to commit at least one of the crimes charged in the indictment, namely, the illegal possession with intent to distribute, or the distribution of narcotic drug controlled substances. In short, the Government must prove that a conspiracy existed with respect to these matters. That is the first element.

1 The second element is that the defendant Luis
2
3 Bustamonte knowingly and wilfully became a participant in the
4 conspiracy with knowledge of at least one of its criminal
5 purposes.

6 And the third element is that one of the con-
7 spirators knowingly committed at least one overt act set forth
8 in the indictment at or about the time alleged, in furtherance
9 of the conspiracy, and that at least one of these acts was
10 committed in the Southern District of New York, which as I have
11 indicated to you includes Manhattan or New York County but does
12 not include Queens County.

13 Now, conspiracy defined. First as to the existence
14 of the conspiracy, simply to find a conspiracy is a combina-
15 tion of two or more persons by concerted action to accomplish
16 some unlawful purpose.

17 A conspiracy is an unlawful combination or agree-
18 ment to violate the law. Whether or not the persons charged
19 in the indictment accomplished what it is alleged they con-
20 spirated to do is immaterial to the question of guilt or inno-
21 cence. Thus, the success or lack of success of the conspiracy
22 doesn't matter for a conspiracy is a crime entirely separate
23 and distinct from the substantive crime that may be the goal
24 of the conspiracy.

25 A conspiracy has sometimes been called a partner-

1 ship in criminal purposes in which each member becomes the
2 agent of every other member. However, to establish the
3 existence of a conspiracy, the Government is not required to
4 show that two or more persons sat around a table and entered
5 into a solemn compact, orally or in writing, stating that they
6 have formed a conspiracy to violate the law, setting forth
7 the details of the plan, the means by which it is to be
8 carried out, or the part to be played by each conspirator.

9 Your common sense will tell you that when men
10 undertake to enter into a conspiracy, much is left to unex-
11 pressed understanding. Conspirators do not usually reduce
12 their agreements to writing or acknowledge them before a
13 notary public, nor do they publicly broadcast their plans.
14 A conspiracy is almost always characterized by secrecy.

15 In determining the existence or non-existence of
16 a conspiracy, it is not required that you find that each and
17 every one of the alleged co-conspirators joined in the con-
18 spiracy. It is sufficient if you find beyond a reasonable
19 doubt, that two or more persons, in any manner, through any
20 contrivance, impliedly or tacitly, came to a common under-
21 standing to violate the law.

22 In determining whether there has been an unlawful
23 agreement you may consider acts and conduct which are done to
24 carry out a criminal purpose. Usually, the only evidence
25

1 available is that of disconnected acts on the part of the
2 alleged individual conspirators which acts you may find when
3 taken together in connection with each other and with the
4 reasonable inferences flowing therefrom, show a conspiracy or
5 agreement to secure a particular result as satisfactorily and
6 conclusively as more direct proof.
7

8 If upon consideration of all the evidence, direct
9 and circumstantial you find beyond a reasonable doubt that
10 the minds of at least two of the alleged conspirators met in
11 an understanding way, and that they agreed, as I have explained
12 a conspiratorial agreement to you, to work together in
13 furtherance of the unlawful scheme alleged in the indictment,
14 and that thereafter at least one of the co-conspirators did any
15 overt act to effect the object of the conspiracy, then proof
16 of the existence of a conspiracy is complete. In this connection,
17 as I have told you, it is not necessary for the Government
18 to prove the success of the conspiracy in order to establish
19 a violation of the conspiracy statute. As a conspiracy
20 is basically the agreement to violate the law, it may exist
21 even though the final objectives were never accomplished. In
22 connection with this further element, some further comments
23 may be helpful.

24 You will recall that I defined a conspiracy as a
25 combination of two or more persons by concerted action to

1 accomplish some unlawful purpose. Thus, before you may find
2 that a conspiracy existed, you must also find that what the
3 conspirators intended to do would have violated one or more
4 federal laws if they had succeeded in accomplishing what they
5 set out to do.
6

7 The indictment alleged the conspiracy began
8 September 1, 1973 and continued up to the date of the filing
9 of the indictment, October 11, 1973. It is not necessary for
10 the Government to prove that the conspiracy started and ended
11 on those specific dates. It is sufficient if you find that in
12 fact a conspiracy was formed and that it existed for some
13 substantial time within the period set forth in the indictment
14 and that at least one overt act was committed during that
15 period.

16 A conspiracy, once performed, continues for as
17 long as the evidence shows the conspirators intended to con-
18 tinue it. Such intention may be inferred from such activities,
19 if any, of the conspirators which you find to be, in further-
20 ance of the purpose of the conspiracy.

21 If you find beyond a reasonable doubt that the
22 conspiracy charged in the indictment existed, you must deter-
23 mine who its members were, and whether the defendant Luis
24 Bustamonte participated in the conspiracy with knowledge of
25 its unlawful purposes and in furtherance of its unlawful

objectives.

In determining whether the defendant became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so, with knowledge of its unlawful purpose. Did he join with an awareness of at least some of the aims and purposes of the conspiracy?

Knowledge is a matter of inference from facts proved. It is not necessary that a defendant be fully informed as to the details of the scope of the conspiracy in order to justify an inference of knowledge. A defendant need not know the full extent of the conspiracy and all of its activities and actors. However, mere association with one or more of the conspirators does not make one a member of the conspiracy. Nor is knowledge without participation sufficient. What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with the intent to aid in the accomplishment of those unlawful ends.

If you find that the conspiracy existed and a particular defendant knowingly participated in it, the extent of his participation has no bearing on the question of guilt or innocence. The guilt or innocence of a conspirator is not measured by the extent or the duration of his participation. Even if he participated in it to a degree more limited than that of his co-conspirators, he is equally culpable so long as

he was in fact a conspirator.

If one joined the conspiracy after its formation and engaged in it to a more limited degree than other co-conspirators, he is equally culpable so long as you find beyond a reasonable doubt that he was in fact a co-conspirator. Thus, each member of a conspiracy may perform separate and distinct acts at different times and at different places; some conspirators may play major roles while others may play minor roles.

In other words, it is not required that a person be a member of the conspiracy from its very start -- he may join it at any point during its progress, and be held responsible for all that has been done before he joined, and all that may be done thereafter during its existence and while he remains a member. Simply stated, using the partnership analogy again, by becoming a partner he assumes all the liabilities of the partnership, including those that occurred before he became a member. Similarly, each conspirator need not know the identity or the number of all his confederates. The conspirators may not have previously associated together. One of the defendants may know only one other member of the conspiracy, but if he enters into an unlawful agreement with that other member of the conspiracy, he becomes a party thereto.

Nor is it necessary that a conspirator receive any

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2 pecuniary benefit from his participation in the conspiracy as
3 long as he, in fact, participated in it in the way I have
4 instructed you.

5 The question is: did a defendant join the others
6 with the awareness of at least one of the basic purposes and
7 aims of the conspiracy? If so, then he adopts as his own the
8 past and future acts of all the other conspirators.

9 I gave you this instruction during the course of
10 the trial and I will repeat it now.

11 In determining whether a conspiracy existed you
12 should consider the acts and declarations of all the alleged
13 participants. However, in determining whether a particular
14 defendant was a member of the conspiracy, you may consider only
15 his own acts and statements. He cannot be bound by the acts
16 or declarations of other alleged participants until you are
17 satisfied beyond a reasonable doubt that a conspiracy existed
18 and that the defendant you are then considering was one of its
19 members. In other words, your determination as to the par-
20 ticipation, in the conspiracy, of each defendant must be based
21 upon what you find to have been his own actions; his own
22 conduct, his own statements or declarations; his connection
23 with the acts and conduct of other alleged co-conspirators and
24 the reasonable inferences to be drawn therefrom.

25 You will recall that during the course of the trial

1 some evidence was received subject to connection. Thus
2
3 testimony concerning acts or statements of one alleged co-
4 conspirator, done or said in the absence of other alleged co-
5 conspirators although received in evidence without limitation
6 against the alleged co-conspirator who did the act or made the
7 statement or admission, was admitted into evidence as to the
8 absent alleged co-conspirator on a conditional or tentative
9 basis.

10 If you find beyond a reasonable doubt that a con-
11 spiracy existed and if you also find beyond a reasonable doubt
12 that a particular defendant was one of its members, then the
13 statements thereafter knowingly made and the acts thereafter
14 knowingly done by any person likewise found to be a member of
15 the conspiracy, can be considered by the jury as evidence in
16 the case as to any defendant found to be a member of the con-
17 spiracy, even though the statements and acts may have occurred
18 in the absence and without the knowledge of that defendant,
19 provided such statements and acts were knowingly made and done
20 during the continuance of such conspiracy and in furtherance
21 of some object or purpose of the conspiracy. Thus, statements
22 of any conspirator, which are not in furtherance of the con-
23 spiracy or which are made before its existence or after its
24 termination may be considered as evidence only against the per-
25 son making them.

1
2 In that connection, I will charge you that a con-
3 spiracy terminates with the arrest of each individual; if you
4 find that a conspiracy existed, it terminates with the arrest,
5 the ending of the purpose of the conspiracy.

6 A final word on this second element. I told you
7 that a conspiracy, once formed, is presumed to have continued
8 until either its object was accomplished or there is some
9 affirmative act of termination by its members. So, too, once
10 a person is found to be a member of a conspiracy, he is pre-
11 sumed to continue his membership therein until its termina-
12 tion, and the burden is upon the conspirator to satisfy you
13 by affirmative proof that he withdrew and disassociated him-
14 self from it.

15 The third element, namely overt acts, which is the
16 second section of Count 1 but it is included in Count 1.

17 If you find beyond a reasonable doubt that the
18 alleged conspiracy existed and that the particular defendant
19 was a member of the conspiracy, you must consider then the
20 third element and that is the requirement of an overt act.

21 The overt acts referred to in Count one are not
22 spearate charges, they are part of the conspiracy count and
23 you may not find a defendant guilty unless and until you are
24 convinced beyond a reasonable doubt that at least one of the
25 overt acts charged in the indictment was knowingly and wilfully

1 committed by at least one of the conspirators, and that at
2 least one act was committed in the Southern District of New
3 York.
4

5 The offense of conspiracy is complete when the
6 unlawful agreement is made and any overt act is done by a
7 conspirator to effect the object of the conspiracy. Thus,
8 an overt act is an act knowingly and wilfully committed by one
9 of the conspirators in an effort to effect or accomplish some
10 object or purpose of the conspiracy. The overt act need not
11 be a criminal act or an act which, of itself, constitutes an
12 objective of the conspiracy; it may be an act which is innocent
13 on its face, but it must be of such character that it furthers,
14 or promotes, or aids and assists in accomplishing a purpose
15 of the conspiracy charged in the indictment.

16 It is not necessary for you to find that all of the
17 alleged overt acts charged in the indictment were committed,
18 nor is it necessary that an overt act involve a particular
19 defendant. It is enough if you find that at least one of the
20 named overt acts charged in the indictment was committed by a
21 conspirator in furtherance of the conspiracy.

22 The indictment charges two specific overt acts.
23 And, as I have indicated to you, it is not necessary to find
24 that both were done in order to find a conspiracy. That
25 part of the Count 1 reads as follows:

"In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

"1. On or about October 2, 1973, defendant Luis Bustamonte had a telephone conversation.

"2. On or about October 2, 1973, defendant Dora Munoz possessed approximately one-half kilogram of cocaine."

In defining the element of the conspiracy, I have used the words "knowingly" and "wilfully".

A person acts knowingly if he acts voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word knowingly was to insure that no one would be convicted for an act done because of mistake, or accident, or other innocent reason.

A person acts wilfully if he acts voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the laws.

That completes my charge on conspiracy and I told you I would summarize the three essential elements. First that a conspiracy existed as charged in the indictment. Second, that the particular defendant knowingly and wilfully joined the conspiracy; third, that one of the conspirators knowingly and

1 wilfully committed at least one of the overt acts set forth
2 in the indictment. You must be satisfied that these elements
3 are established by the Government beyond a reasonable doubt
4 with respect to Count one. That concludes my charge to you
5 with respect to Count one -- the conspiracy count.
6

7 As I told you the law makes a conspiracy a
8 separate and distinct offense from any substantive offenses
9 that are alleged to have been the object of the conspiracy.
10 The indictment alleges two substantive counts in addition to
11 the conspiracy count I have already described. Count two
12 charges the defendant with violating Title 21 of the United
13 States Code, Sections 812, 841(a)(1), and 841(b)(1)(A), and
14 also Title 18, United States Code, Section 2, a section which
15 relates to aiding and abetting. Section 841 of Title 21
16 provides in pertinent part as follows:

17 "It shall be unlawful for any persons knowingly
18 or intentionally to distribute or to possession with intent
19 to distribute a controlled substance."

20 Section 2 of Title 18, United States Code, provides
21 in pertinent part:

22 "Whoever commits an offense against the United
23 States or aid, abets, counsels, commands, induces or procures
24 its commission, is punishable as a principal and

25 "Whoever wilfully causes an act to be done which

if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Count two reads:

"The Grand Jury further charges:

"On or about the 2nd day of October, 1973, in the Southern District of New York, Luis Bustamonte, Jacinto Moreira, also known as Rocky, and Dora Munoz, the defendants, unlawfully, intentionally and knowingly did possession with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 489.5 grams of cocaine."

Before you may find the defendant guilty of the crime charged in this count of the indictment, you must be satisfied that the Government has proven each of the following three elements beyond a reasonable doubt. First, that on or about the date charged, that is October 2n, 1973, the defendant did possess with intent to distribute a narcotic drug controlled substance. The word possess as used in this statute has its common everyday meaning, and that is simply to have something within your control.

A person who knowingly has direct physical control over an item at a given time is then in actual possession of it. Possession is also defined as having both the power and the intention at a given time to exercise the dominion or control over an item, either directly or through another person.

Under the law, possession may be sole or joint. If one person alone has possession of a matter, possession is sole. If two or more persons share possession of an object, possession is joint.

The word distribute in the statute means the actual, constructive, or attempted transfer of the controlled substance.

As to the second element, if you find that the defendant did distribute and possess with intent to distribute the controlled substance, you must next determine whether or not he did so unlawfully, wilfully and knowingly. An act is done wilfully if done voluntarily and intentionally, with a specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or disregard the law. An act is done knowingly if done voluntarily and intentionally and not because of mistake, accident or other innocent reason. The purpose of adding the word knowingly to the statute is to be sure that no one would be convicted for an act done because of mistake, accident or other innocent reason.

With respect to the offense charged in this case, the law requires that specific intent be proved beyond a reasonable doubt before a defendant can be convicted.

The third element. If you are satisfied that the first and second elements of the offense charged have been

1 proved beyond a reasonable doubt, you must then determine
2 whether or not the substances contained in Government's Exhibit
3 1 was in fact a narcotic drug. In this connection, I will
4 instruct you that as a matter of law, cocaine is a narcotic
5 drug. It has been stipulated that a chemist if called would
6 testify that Exhibit 1 contained cocaine. Even though there
7 has been a stipulation to this effect, you must still find
8 beyond a reasonable doubt that the substance in Exhibit 1 is
9 in fact cocaine.
10

11 With respect to Count two. It is not necessary
12 for the Government to show that the defendant physically com-
13 mitted the offense charged himself. Section 2 of Title 18
14 provides that a person who "aids, abets, counsels, commands,
15 induces or procures" the commission of an "offense against
16 the United States" is as equally punishable as the person who
17 "commits" the offense directly himself.

18 This means that not only is the person who actually
19 commits an illegal act, the principal, punishable, but anyone
20 who aids and abets him in committing that illegal act is like-
21 wise punishable.

22 Accordingly, you may find the defendant Luis
23 Bustamonte guilty of the offense charged if you find beyond a
24 reasonable doubt that the offense was committed and that the
25 defendant aided and abetted in its commission.

1
2 To aid and abet does not mean just knowing that a
3 crime is being committed, even if one is present during its
4 commission. That alone is not sufficient. In order to find
5 that a defendant aided and abetted another to commit a crime,
6 you must be satisfied beyond a reasonable doubt that he
7 knowingly, in some substantial measure, associated himself with
8 the venture, that he participated in it as something he wished
9 to bring about, that he sought by his action to make it succeed.

10 In other words, if one, fully aware of what he is
11 doing, plays a significant role in facilitating a transaction
12 prohibited by law, he is equally guilty with the person who
13 directly performs the illegal acts, even though the latter
14 played a greater or much larger role in the perpetration of
15 the crime.

16 The evidence of a defendant's participation may
17 be circumstantial, from which you may conclude that a
18 defendant, as an aider and abettor, was a participant in the
19 crime charged.

20 A single act may come within the prohibition of the
21 aiding and abetting law.

22 Whether one aided and abetted another to commit
23 a crime must be determined solely upon the alleged aider and
24 abettor's own conduct, acts and statements.

25 I think I have already told you but the indictment

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2 charges that the defendants conspired to distribute and pos-
3 sessed with intent to distribute Schedule I and II narcotic
4 drug controlled substances. Cocaine is such a scheduled
5 narcotic drug controlled substance.

6 Count three charges the defendant with another
7 substantive offense, that is, the failure to appear for his
8 trial after having been released on bail. Even though you
9 heard Mr. Shaw in his summation with respect to this count,
10 you still must find beyond a reasonable doubt that the defend-
11 ant is guilty of the crime charged in Count three, namely,
12 that he failed to appear for his trial after having been
13 released on bail. This statute reads as follows in pertinent
14 part:

15 "Whoever, having been released on bail wilfully
16 fails to appear before any court or judicial officer as
17 required, is guilty of a crime."

18 The indictment reads as follows:

19 "The Grand Jury charges:

20 "On or about the 26th day of November, 1973, in
21 the Southern District of New York, Luis Bustamonte, the defend
22 ant, having been released on bail in connection with a charge
23 of felony did unlawfully, wilfully and knowingly fail to
24 appear before a court and judicial officer as required."

25 Before you may find the defendant guilt of the

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crime charged in Count Three you must be convinced beyond a reasonable doubt that the Government has proved the following elements:

First, that the defendant was admitted to bail pursuant to Chapter 207 in connection with a charge of a crime.

Second, that the defendant failed to appear before the Court as required, and

Third, that the defendant's failure to appear was wilful.

As for the first element, I instruct you that the defendant's release by the United States District Judge was pursuant to Chapter 207. As to the second element, I instruct you that a Federal District Judge is a judicial officer within the meaning of Section 3150.

As to the third element that the defendant wilfully failed to appear, the reason the word wilfully is in there is so that no one will be convicted of a crime because of a mistake or because he does something innocently, not realizing what he was doing.

There is no requirement that he has to know there is a law that makes it a crime to jump bail. All he has to do here to act wilfully is to act freely, to act voluntarily, with a deliberate purpose of not being in this courthouse when

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2 he is supposed to be here.

3 In considering whether the defendant's failure to
4 appear as alleged by the Government was wilful, you may con-
5 sider evidence that the defendant violated the condition of his
6 bond as bearing on his state of mind.

7 With respect to the specific offenses charged in
8 the indictment that concludes that part of it, but before
9 you go to your deliberations there are obviously some other
10 comments that I must instruct you about.

11 At the beginning of my charge I told you that a
12 defendant was presumed innocent and that the presumption of
13 innocence remains with a defendant unless and until the jury
14 is unanimously satisfied of guilt beyond a reasonable doubt.
15 In describing the elements of the offense charged in the
16 indictment I told you that the Government must establish each
17 of those elements by proof beyond a reasonable doubt.

18 Naturally you ask what is a reasonable doubt. The
19 words almost define themselves. That there is a doubt founded
20 in reason and arising out of the evidence or lack of the evi-
21 dence. It is a doubt which a reasonable person has after
22 carefully considering all the evidence.

23 A reasonable doubt is not a vague or speculative
24 or imaginary doubt. It is not caprice, whim or speculation.
25 It is not an excuse to avoid the performance of an unpleasant

duty. It is not sympathy for a defendant.

A reasonable doubt is a doubt which appeals to your reason, your common sense, your experience and your judgment. It is a doubt which would cause a reasonable man or woman, like yourselves, to hesitate to act in relation to your own important private affairs.

Mere suspicion will not justify conviction. Suspicion is not a substitute for evidence nor is it sufficient to convict if you find that the circumstances merely render an accused probably guilty.

On the other hand, it is not required that the Government must prove guilt beyond all possible doubt, but the proof must be of such convincing character that you would be willing to rely and act on it in the important affairs of your own life.

In sum, a reasonable doubt exists whenever, after a fair and impartial consideration of all the evidence before you, you can candidly and honestly state that you do not have an abiding conviction that the defendant is guilty of the charge.

During my explanation of the charge in this indictment I have used words "knowledge" and "intent" as an element of the crime. Knowledge and intent exist in the mind. As we all realize it is not possible to look into a man's mind to

1 see what went on. Therefore, the only way you have for arriv-
2 ing at a decision in these questions is for you to take into
3 consideration all the facts and circumstances shown by the
4 evidence, and to determine from all such facts and circum-
5 stances whether the requisite knowledge and intent were
6 present at the time in question. Direct proof is unnecessary.
7 Knowledge and intent may be inferred from all the surrounding
8 circumstances.
9

10 With respect to Counts one and two only, I charge
11 you as follows:

12 The flight of a defendant after he has discovered
13 that he has been charged with a crime is a fact which if
14 proved may tend to prove consciousness of guilt on the part
15 of the defendant and may be considered and weighed by the jury
16 in connection with all the other evidence.

17 Whether or not evidence of flight shows a con-
18 sciousness of guilt, and the significance, if any, to be
19 attached to such circumstances are matters for your determina-
20 tion. The flight of a defendant does not create a presumption
21 of guilt, but it is merely a fact to be considered by you
22 together with all the other evidence, in determining the guilt
23 or innocence of the defendant in connection with Counts 1 and
24 2.

25 I want to read what I said to you about credibility.

and expand upon it at this time.

You as jurors are the sole judges of the credibility of the witnesses. You and you alone must determine what weight their testimony deserves.

Preliminarily, you should not be influenced by the mere number of witnesses called by either side. The weight of the evidence is not determined by the number of witnesses testifying on either side and rather you should consider all the facts and circumstances in evidence to determine where the truth lies.

In assessing credibility, you should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief.

The degree of credit to be given a witness should be determined by his demeanor, his relationship to the controversy and the parties, his bias or impartiality, the reasonableness of his statements, the strength or weakness of his recollection viewed in the light of all other testimony and the attended circumstances in the case and the extent to which if at all each witness is either supported or contradicted by other evidence.

How did the witness impress you? Did his version appear straightforward and candid, or did he try to hide some

of the facts? Is there a motive to testify falsely?

In passing upon the credibility of a witness, you can take into account inconsistencies or contradictions as to material matters in his own testimony, or any conflict with that of another witness, also any inconsistencies or omissions in prior testimony or any prior statement of material matters as to which he may have testified upon the trial.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection is not an uncommon experience.

A witness may be inaccurate, contradictory or untruthful in some respects and yet be entirely credible in the essentials of his testimony.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find that any witness has testified falsely you can do one of two things. You can either reject all of that witness' testimony on the ground that it is all tainted by falsehood and that none of it is worthy of belief, or you can accept that part which you believe to be

1 credible and reject only that part which you believe to be
2 tainted by falsehood.

3 Now, should you find that all or any part of a
4 particular witness' testimony was false, you may not of course
5 infer that the opposite of that testimony is the truth unless
6 there is other evidence to that effect. Any testimony
7 rejected by you as false is no longer in the case insofar as
8 any finding that you may make is concerned. You will recall
9 that I told you that an inference was a conclusion which
10 reason of common sense leads you to draw from the facts which
11 you find have been proved. Thus, a finding of fact may not
12 be established merely by a negative inference arising from
13 your disbelief and rejection of any testimony.

14 In passing upon credibility, the ultimate question
15 for you to decide is: Did the witness tell the truth here
16 before you? It is for you to say whether his testimony at
17 this trial is truthful in whole or in part, in the light of
18 his demeanor, his explanations and all the evidence in the
19 case.

20 If a potential witness could have been called by
21 the Government or by the defendants and neither side called
22 him, then you may infer that the testimony of the absent
23 witness might have been unfavorable either to the Government
24 or to the defendant or to both of them. But on the other hand,
25

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2 it is equally within your province to draw no inference at
3 all from the failure of either side to call a witness.

4 I told you at the outset of this case that the law
5 does not require a defendant in a criminal case to testify or
6 present any evidence on his own behalf. I have also told you
7 that a defendant is not required under our laws to prove his
8 innocence. He is presumed to be innocent at all times and
9 through the entire trial unless and until the Government proves
10 him guilty beyond a reasonable doubt.

11 For these reasons a defendant need not take the
12 witness stand and testify in his own behalf. The fact that a
13 defendant did not testify at this trial does not create any
14 presumption for or against him, and I charge you that this
15 fact must not weigh in the slightest against or for him, nor
16 shall this fact enter into your discussions or deliberations in
17 any manner.

18 With respect to the statement given to Mr. Leupp,
19 I want to advise you that evidence relating to any statement
20 claimed to have been made by the defendant outside of court
21 and after a crime has been committed should be considered
22 with caution and weighed with care. All such evidence should
23 be disregarded entirely unless the evidence in the case con-
24 vinces you beyond a reasonable doubt that the statement was
25 knowingly made.

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2 A statement is knowingly made if done voluntarily
3 and intentionally, and not because of mistake or accident or
4 other innocent reasons.

5 In determining whether any statement claimed to
6 have been made by a defendant outside of court, and after a
7 crime has been committed, was knowingly made the jury should
8 consider the age, training, education, occupation and physical
9 and mental condition of the defendant and his treatment while
10 in custody or under interrogation, as shown by the evidence in
11 the case; and also all other circumstances in evidence sur-
12 rounding the making of the statement including whether, before
13 the statement was made the defendant knew or had been told
14 and understood that he was not obligated or required to make
15 the statement claimed to have been made by him; that any state-
16 ment which he might make could be used against him in court;
17 that he was entitled to the assistance of counsel before making
18 any statement, either written or oral, and that if he was
19 without money or means to retain counsel of his own choice, an
20 attorney would be appointed to advise and represent him free
21 of cost or obligation.

22 If the evidence in the case does not convince you
23 beyond a reasonable doubt that the statement was voluntarily
24 and intentionally made you should disregard it entirely. On
25 the other hand, if the evidence in the case does show beyond

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2 a reasonable doubt that a statement was in fact voluntarily
3 and intentionally made by a defendant, you may consider it as
4 evidence in the case against the defendant who voluntarily and
5 intentionally made the statement.

6 The defendant, you will recall, has introduced
7 evidence tending to establish his good reputation in his
8 community. Such evidence may indicate to you that it is
9 improbable that a person of good character would commit the
10 crime charged. You should consider this evidence together
11 with all other evidence in this case in determining the guilt
12 or innocence of the defendant. The circumstances may be such
13 that evidence of good character alone may create a reasonable
14 doubt of the defendant's guilt, although without it the other
15 evidence would be convincing.

16 However, evidence of good character and reputation
17 should not constitute an excuse to acquit the defendant if
18 the jury, weighing all the evidence, including the evidence
19 of good character, is convinced beyond a reasonable doubt that
20 the defendant is guilty of the crime charged in the indictment.

21 You may not draw any inference, favorable or
22 unfavorable, towards the Government or the defendant on trial
23 from the fact that certain persons were not named as defend-
24 ants or are not on trial here. Those matters are wholly
25 outside your concern and have no bearing on your function as

jurors.

During the course of the summation of Mr. Akerman I asked you to disregard the statement with respect to the different degrees of punishment under the different counts here as to bail jumping and the narcotics charges, conspiracy and substantive counts. But, that has nothing to do with what I am now about to charge you.

In your deliberations please do not discuss the question of possible punishment. That is a matter that rests on my conscience and my conscience alone, because the Judge and the Judge alone is the one who has the obligation of imposing sentence when and if guilt is determined.

If you do discuss it amongst yourselves then you are encroaching on my function and I ask you not to do it. Your function is to consider the facts and to determine the facts. My function is to pass upon the law and in the event of conviction to impose sentence.

If you find on all the evidence, that the evidence respecting a defendant leaves a reasonable doubt as to his guilt, you should not hesitate for a moment to return a verdict of acquittal as to that defendant.

On the other hand, if you find beyond a reasonable doubt that the law has been violated as charged, you should not hesitate, because of sympathy or because of any other

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2 reason, to render a verdict of guilty.

3 I indicated to you that your verdict must be
4 unanimous. It is your duty as jurors to consult with one
5 another and to deliberate with a view to reaching an agree-
6 ment, if you could do so without violence to individual
7 judgment. Each of you must decide the case for yourself but
8 do so only after an impartial consideration of the evidence
9 with your fellow jurors. In the course of your deliberations,
10 do not hesitate to reexamine your own views and change your
11 opinion if convinced it is erroneous. But do not surrender
12 your honest conviction as to the weight or effect of evidence
13 solely because of the opinion of your fellow jurors, or for
14 the mere purpose of returning a verdict.

15 You are not partisans. You are judges -- judges
16 of the facts. Your sole interest is to ascertain the truth
17 from the evidence in the case.

18 If it becomes necessary during your deliberations
19 to communicate with the Court, you may send a note by a marshal
20 signed by your foreman, or by one or more members of the jury.
21 No member of the jury should ever attempt to communicate with
22 the Court by any means other than a signed writing, and the
23 Court will never communicate with any member of the jury on
24 any subject touching the merits of the case, other than in
25 writing, or orally here in open court.

1
2 You will note from the oath about to be taken by
3 the marshals that they too, as well as all other persons, are
4 forbidden to communicate in any way or manner with any member
5 of the jury on any subject touching the merits of the case.

6 Bear in mind also that you are never to reveal to
7 any person -- not even to the Court -- how the jury stands,
8 numerically or otherwise, on the question of the guilt or
9 innocence of the accused unless and until after you have reached
10 an unanimous verdict.

11 It is proper to add the caution that nothing said
12 in these instructions -- nothing in any form of verdict pre-
13 pared for your convenience -- is to suggest or convey in any
14 way or manner any intimation as to what verdict I think you
15 should find. What the verdict shall be is the sole and
16 exclusive duty and responsibility of the jury.

17 While we have a custom, it is not absolutely
18 necessary that the juror occupying the first seat be the
19 foreman of the jury or the foreperson. I guess I have to use
20 that word today, you may select your foreperson by vote. How
21 you conduct your deliberations is entirely up to you. But I
22 indicated to you before that you are entitled to have the
23 exhibits that are introduced into evidence and any testimony
24 that you want reread. I would ask you if you do want testi-
25 mony reread, if you can be as precise as possible to pinpoint

1 exactly what it is that you want. All of this has not been
2 transcribed and we don't have a transcript of it so we have
3 to go through it. If you want it, we will do it but if you
4 do require any, try and pinpoint exactly what it is that you
5 would like reread.
6

7 When you report your verdict, you will report it as
8 follows:

9 We the jury on Count 1 unanimously find the defend-
10 ant -- whatever it is -- and the same with respect to Count 2
11 and the same with respect to Count 3.

12 Counsel have the right to except to any part of
13 the charge that I have made and may request further instruc-
14 tions. I will take those at the side bar. If we will be any
15 length of time I'll let you go out and come back after we are
16 through.

17 (At the side bar.)

18 THE COURT: Any exceptions, Mr. Shaw.

19 MR. SHAW: Your Honor said that cocaine is on the
20 list of controlled substances two times. It may have been in
21 '73. I don't think there is any list right now.

22 MR. AKERMAN: There is.

23 MR. SHAW: I think it expired.

24 THE COURT: Yes, it is.

25 Anything else?

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MR. SHAW: No.

MR. AKERMAN: Your Honor, in talking about the voluntariness of the statement, Mr. Leupp's statement, the same should also apply to Mr. Magnuson's statement made to Mr. Magnuson. The only other request I make would be some instruction relating to the properness of the phone call.

(In open court.)

THE COURT: When I referred to voluntariness of the statement if one was made by the defendant, I referred to Mr. Leupp. I should also -- I have forgotten to mention there was also an alleged statement made by Mr. Magnuson and that should be considered in the same respect.

You can see the necessity of having all the jurors, even though this was a short trial. We have reached the stage and maybe you are happy or unhappy that you have to be excused from participation in this case, but I appreciate your being here and giving attention to this matter. It was necessary as an alternate juror.

(Alternate Juror excused.)

(The oath was administered to the marshal.)

THE COURT: We will be sending menus for you. That's no indication how long or short you should deliberate. You can make your luncheon selection and lunch will be delivered sometime around 1 o'clock. That will save you the

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2 time going out to a restaurant which would probably take at
3 least an hour and a half or more. I do suggest when your
4 lunch does come if you are in the middle of deliberation that
5 you step for a little bit and enjoy your lunch in comfort.
6 We all have to eat and we will take a little time off when
7 lunch comes.

8 The menu should be furnished to you very shortly.

9 (Jury left to deliberate.)

10 THE COURT: Gentlemen, I suggest you get the
11 exhibits together that are in evidence, eliminate that tele-
12 gram, and we have your consent in the event that the jury send
13 in a note requesting the exhibit or any part thereof without
14 your consultation.

15 MR. AKERMAN: No problem, your Honor.

16 MR. SHAW: I don't have any exhibits.

17 THE COURT: If the jury calls for the exhibits
18 can we send them in without getting you back here?

19 MR. SHAW: Your Honor, I prefer if they ask for
20 a specific exhibit and at that point go over it with the U.S.
21 attorney.

22 THE COURT: That's perfectly all right. Just
23 remain here constantly then. Stay in the courtroom. You can
24 go back but --

25 MR. SHAW: I'll be upstairs, your Honor.

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2 THE COURT: Where will you be?

3 MR. SHAW: I'll go to the cafeteria. I never go
4 to 600 Madison Avenue. All I said --

5 THE COURT: You have a right to do it. Don't
6 apologize about it. All I want to know is that you can be
7 reached on the phone within two or three minutes. I suggest,
8 however, that you both wait around for ten or fifteen minutes.
9 If we get any call it's usually within that period of time.

10 (Recess.)

11 (Note received from the jury at 11:50 a.m.)

12 (In open court, jury not present.)

13 THE COURT: I have the following note received
14 at 11:41:

15 "Transcripts of the two phone conversations;

16 "Two. Copy of the bond;

17 "Three. All other written documents (as related
18 this case) that have been entered as evidence."

19 It's signed by the foreman.

20 Do you have them all together?

21 MR. AKERMAN: Yes, your Honor.

22 (Pause.)

23 THE COURT: Let's get them together.

24 (Court's Exhibit 1 marked.)

25 THE COURT: No objection?

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MR. SHAW: No, your Honor.

THE COURT: All right, stand by.

(Exhibits requested are sent in to the jury.)

(11:40 a.m. Recess.)

(Luncheon recess.)

54a

TRANSCRIPTS OF ALLEGED RECORDED CONVERSATIONS
BETWEEN ANNA GARCIA AND THE APPELLANT (pp. 54a-62a)

UNIDENTIFIED

MALE: Hello.

ANNA: Hello.

UNIDENTIFIED

MALE: Yes?

ANNA: Who is this? Bustamante?

UNIDENTIFIED

MALE: Wait a moment.

ANNA: It's... Hm.

BUSTAMANTE: Hello?

ANNA: Hello. Bustamante?

BUSTAMANTE: Yeah.

ANNA: How are you? It's Anna.

BUSTAMANTE: Oh, good. How are you?

ANNA: So, so. Look...

BUSTAMANTE: Oh, that's good. Yes?

ANNA: Look, what's new?

BUSTAMANTE: Ah, nothing new.

ANNA: Hm.

BUSTAMANTE: Ah, nothing new. You know I called you earlier to see if

BUSTAMANTE:
(cont.) Roque had left. Did he leave?

ANNA: Yes, he left.

BUSTAMANTE: What time did he leave, at 2:30?

ANNA: Yes, at the regular time, 2:30. Look Bustamante...

BUSTAMANTE: Yes.

ANNA: You know that he spoke to a man over there, at the airport.

BUSTAMANTE: Yes.

ANNA: And the man wants to buy it all, that's everything, and at a good price. So the man is going to call me at home this evening.

BUSTAMANTE: Yes.

ANNA: Do you have it all there, the shirts?

BUSTAMANTE: No, everything is over there.

ANNA: Where?

BUSTAMANTE: Up there, with...

ANNA: Who has it?

BUSTAMANTE: Over there, where Roque took me.

ANNA: But I... Where is that?

BUSTAMANTE: Ha?

ANNA: Mm. Because he told me to call you.

BUSTAMANTE: You know that area, where that is.

ANNA: Yes?

BUSTAMANTE: You know the area where that is.

ANNA: Oh, where?

BUSTAMANTE: There, where you went, at Pepe's.

ANNA: At Pepe's?

BUSTAMANTE: Yes.

ANNA: And it's all there? It's Pepe who has it, then? Because he said you had it... No, no... Look, look, look. Anyway... Eh... He... The man came. He told me to call you to get it all, because the man is going to buy the whole lot tonight but like that, all the shirts. I'm in the street, don't worry.

BUSTAMANTE: Well I don't know because that's already, already... It's been sold already. That can't be taken away. That can't be turned back. It's already sold.

ANNA: It can't be taken away?

BUSTAMANTE: No, not anymore.

ANNA: That is already in Ballantine?

BUSTAMANTE: Probably wouldn't be given back. What if when he sees it he doesn't buy it and it's back and forth, back and forth. That's the problem.

ANNA: As soon as he sees it, the trousers will buy it.

BUSTAMANTE: Maybe. Maybe he doesn't like it and then back again. That's the problem.

ANNA: Look, look, if he doesn't like them, then you are going to take it; because then the man is going to call me tonight. I'm going to tell him to wait until tomorrow.

BUSTAMANTE: Sure, to wait until tomorrow, because...

ANNA: If he doesn't buy it...

BUSTAMANTE: (UNREADABLE)

ANNA: Yes, if he doesn't buy it bring it all; because the man is going to call me to get it all. O.K.?

BUSTAMANTE: Sure.

ANNA: O.K.

BUSTAMANTE: Then I'm going to call there tonight because the other night when I called there, they told me they had sold more.

ANNA: Yes

BUSTAMANTE: So, there is little left.

ANNA: Yes. So, you'll go over there tonight and in case...

BUSTAMANTE: There's no need to go. I'll just make a phone call.

ANNA: Aha.

BUSTAMANTE: To see if he has that, otherwise there's none left.

ANNA: If he doesn't have it...

BUSTAMANTE: If he sees it and he doesn't want it, I'll have to take it back again.

ANNA: Look, if he doesn't want it, take it. Because the man wants it, you see? He doesn't know anything and he wants to pay a good price for it.

BUSTAMANTE: Doesn't he know what quality it is?

ANNA: No, no, no, no. No, no, no. But he wants it all. Do you understand?

BUSTAMANTE: Yes.

ANNA: O.K. So, you'll be calling me tonight?

BUSTAMANTE: No, no. I'll be going there...

ANNA: You'll be going there tonight?

BUSTAMANTE: I'll call them up.

ANNA: ...to call?

BUSTAMANTE: We'll see what they tell me.

ANNA: And then you'll call me?

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BUSTAMANTE: (UNREADABLE)

ANNA: Aha. So, you'll be calling me late.

BUSTAMANTE: Yes.

ANNA: O.K. I'll be waiting for the call. O.K.?

BUSTAMANTE: Sure.

ANNA: O.K.

CHILD: Hello.

ANNA: Hello.

CHILD: Who is it?

ANNA: ME. It's Anna, Roque's wife. Is your Dad there?

CHILD: Yes, he is. Dad, Roque's wife. Just a minute.

ANNA: Yes.

BUSTAMANTE: Hello.

ANNA: Hello, Bustamante?

BUSTAMANTE: Yes.

ANNA: How are you, did you make the call?

BUSTAMANTE: Ah?

ANNA: Did you call?

BUSTAMANTE: Yes, but he said that today he's gone out, he said, they've gone out to do that.

ANNA: All of it?

BUSTAMANTE: Eh?

ANNA: Did they get it all?

BUSTAMANTE: Yes, they have it all already.

ANNA: Do they have it at home?

BUSTAMANTE: Yes, I think so, right?

ANNA: Is the woman the Colombian?

BUSTAMANTE: Yes.

ANNA: Ugh. Because I spoke to the man again and, you know, he says, what's going on that he wants it, you know. I told him... I told him what you told me, now. I told him you were supposed to call me again to tell me if they had bought it all.

BUSTAMANTE: Tell him to wait until tomorrow; see what happens.

ANNA: To wait until tomorrow, see what happens?

BUSTAMANTE: Sure.

ANNA: Yes. Because it's already in the house? The woman...

BUSTAMANTE: Yes, it's already in the house. She... I think they took it all there.

ANNA: Didn't he give it to you?

BUSTAMANTE: No, no, no, that... He spoke to her and everything; he made the deal.

ANNA: He spoke to her and everything?

BUSTAMANTE: Ah?

ANNA: He spoke to her and everything?

BUSTAMANTE: Yes, because that is already a sure thing.

ANNA: So, well; he told me to tell you...

BUSTAMANTE: No, no, he made the deal with her and everything.

ANNA: Ugh.

BUSTAMANTE: He spoke to her and delivered it to the apartment.

ANNA: Last night, last night?

BUSTAMANTE: Yes.

ANNA: Ugh.

BUSTAMANTE: Yes.

ANNA: So, then she has everything?

BUSTAMANTE: She has everything, yes. And she also gave him some money.

ANNA: Oh.

BUSTAMANTE: Yes, yes, did he tell you?

ANNA: Yes, yes, he told me, yes. Oh.

BUSTAMANTE: So I called early and he told me that he had sold about four more.

ANNA: That she had sold four more?

BUSTAMANTE: She already has the money.

ANNA: Oh. O.K.

BUSTAMANTE: But since I have been busy...

ANNA: Then call me.

BUSTAMANTE: ...I had not been around there.

ANNA: Yes, are you going to pick up the money tonight?

BUSTAMANTE: Eh?

ANNA: Are you going to pick up the money tonight?

BUSTAMANTE: I might go. The thing is (UNREADABLE) is not at home.

ANNA: Aha. O.K., O.K. Call me at home.

BUSTAMANTE: I'll call you, yes.

ANNA: O.K.

BUSTAMANTE: Sure.

ANNA: O.K. Bye.

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BUSTAMANTE: Bye.

ANNA: Bye.

NA:ml

AFFIDAVIT OF NATHANIEL H. AKERMAN RE: DILIGENT SEARCH
(pp. 63a-65a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
:
UNITED STATES OF AMERICA

-v- :

LUIS BUSTAMANTE,

Defendant.

: AFFIDAVIT
: 73 Cr. 953
:
:
: ----- -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss:
SOUTHERN DISTRICT OF NEW YORK)

NATHANIEL H. AKERMAN, being duly sworn, deposes
and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and as such, I am familiar with the facts and the prior proceedings in the above captioned action. This affidavit is made on the basis of first hand information and information and belief.

2. This affidavit is submitted in support of the Government's motion to admit^(t) into evidence the transcripts of the two tape recorded telephone conversations between the defendant Luis Bustamante and Ana Garcia which occurred on October 2, 1973.

3. The records of the Drug Enforcement Administration reflect that the tape recording in question was ^usubmitted to Assistant United States Attorney Daniel Pykett on November 2, 1973 by Special Agent Joseph C. Sullivan of the Drug Enforcement Administration.

4. Despite the fact that the records of the Drug Enforcement Administration indicate that the tape recording was in the possession of the United States Attorney's office, Agent Edward Magnuson of the Drug Enforcement Administration conducted a thorough search of that agency for the tape subsequent to the defendant Bustamante's arrest on March 18, 1977. Agent Magnuson searched the non-narcotic evidence vault on the 19th floor of the Drug Enforcement Administration's Headquarters at 555 West 57th Street, New York, New York, the safe maintained by his administrative section, Group 22, and his desk. Agent Sullivan also searched his desk. None of these efforts succeeded in locating the tape.

5. Subsequent to the defendant Bustamante's arrest on March 18, 1977, a thorough search for the tape was conducted by the United States Attorney's office for the Southern District of New York at 1 St. Andrew's Plaza, New York, New York. Joseph Vitale, the Administrative Head of the United States Attorney's office, searched the evidence safe located on the fourth floor of the United States Attorney's office twice once by himself and the second time accompanied by Assistant United States Attorney Nathaniel H. Akerman. Assistant United States Attorney Rhea Neugarten searched the safe maintained by the Narcotics Unit of the United States Attorney's office on the Ninth Floor. Neither the tape, nor any record of the tape were found in either safe. Additionally, both Akerman and Neugarten personally questioned Daniel Pykett about his knowledge of the tape, but he was

A:mf

unable to provide any information concerning its whereabouts.

NATHANIEL H. AKERMAN
Assistant United States Attorney

Sworn to before me

this 6th day of May, 1977.

JUDGMENT AND COMMITMENT ORDER DATED JUNE 16, 1977
LUIS RUSTANOWITZ

DOCKET NO. 71 Cr. 953

66a

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL	In the presence of the attorney for the government the defendant appeared in person on this date		MONTH DAY YEAR June 16, 1977
	☐ WITHOUT COUNSEL	However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.	
	☒ WITH COUNSEL	Stuart Shaw & interpreter Richard Schoen (Name of counsel)	
PLEA	☐ GUILTY, and the court being satisfied that there is a factual basis for the plea, ☐ NOLO CONTENDERE, ☐ NOT GUILTY		
FINDING & JUDGMENT	There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged		
	☒ GUILTY.		
	Defendant has been convicted as charged of the offense(s) of Unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug, conspiracy so to do (Title 21, United States Code, Section 846).		
SENTENCE OR PROBATION ORDER	The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO and ONE HALF (2½) YEARS, on count one (1).		
	Pursuant to the provisions of Title 21, U.S. Code, Section 846, defendant is placed on SPECIAL PAROLE for a period of FIVE (5) YEARS, to commence upon expiration of confinement.		
SPECIAL CONDITIONS OF PROBATION			
ADDITIONAL CONDITIONS OF PROBATION	In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.		
COMMITMENT RECOMMENDATION	The court orders commitment to the custody of the Attorney General and recommends, It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.		

MICROFILM

JUN 23 1977

SIGNED BY
☒ U.S. District Judge
☐ U.S. Magistrate

LEE E. GAGLIARDI

Date

6/17/77

COURT OF APPEALS
SECOND CIRCUITUNITED STATES OF AMERICA,
Appellee

- against -

LOUIS BUSTAMANTE,
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the ~~31st~~ day of ~~August~~ 1977 at One St Andrews Plaza
1st September New York, New York

deponent served the annexed

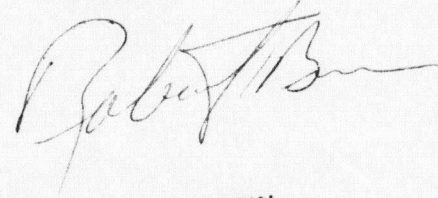
Appendix

Brief

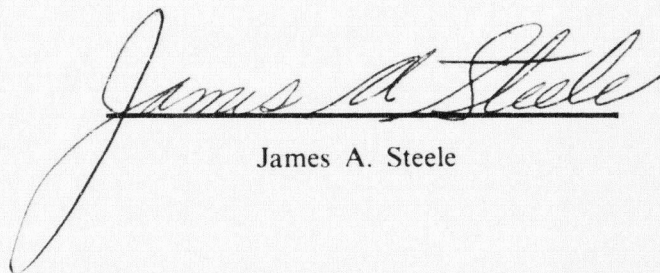
upon
U.S Atty Southern Dist.
Robert Fiske

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this ~~31st~~ 1st
day of ~~August~~ 19 77
September



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979



James A. Steele